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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

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No. 977

ANNA LALOR BURDICK, THOMAS JEFFERSON LALOR, CHARLES LALOR BURDICK, THOMAS MORTON LALOR, MARGARET LALOR CARY, RUTH LALOR OLSON, AND ESTHER LALOR GUTH, *Petitioners*,

v.

CHARLES LALOR BURDICK AND CHEMICAL BANK & TRUST COMPANY, *Trustees, et al.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF.

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Of Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

PETITION.

May It Please the Court: The petition of Anna Lalor Burdick, et al., respectfully shows to this Honorable Court:

Statement of the Matter Involved.

Willard Lalor died testate in the District of Columbia on October 9, 1934, leaving an estate, after taxes, of about $2,000,000, most of which he had inherited from his brother, John Lalor (R. 3, 68, 73, 75). By his Will, Willard Lalor provided that the income of his estate, over and above small annual payments to several kinsfolk, should be accumulated

until twenty-one years after the death of the survivor of his two nieces, Esther and Ruth. Thereupon, the accumulated income and the principal is to be divided among the lawful issue of five nieces and nephews (R. 15).

The Trustees of the Lalor Trust brought action to construe the Will, asking, among other things, whether the clause requiring the accumulation of income is valid. Petitioners, named as defendants, and the Guardian ad litem appointed in the proceeding for minor and unborn beneficiaries and remainderman, joined in the prayers for construction of the Will.

The District Court held the accumulation clause invalid, (R. 80, 107; 33 Fed. Supp. 921). On appeal, the United States Court of Appeals for the District of Columbia reversed the judgment of the District Court and held the clause valid (R. 136; 123 Fed. (2) 924).

Question Presented.

The only question is whether the clause in the Will of Willard Lalor, which directs the accumulation of the surplus income of his estate for the period of two lives in being plus twenty-one years, is valid. The question is one of current common law, there being no statute on the subject in the District of Columbia.

Statement of Jurisdiction.

The judgment in question was entered by the United States Court of Appeals for the District of Columbia on November 26, 1941 (R. 136; 123 Fed. (2) 924). This Court has jurisdiction to review the judgment under Section 240(a) of the Act of February 13, 1925, 43 Stat. 936.

Reasons Relied on for the Allowance of the Writ.

1. The United States Court of Appeals for the District of Columbia, in this case, has decided a question of general importance in holding that the common law and public policy of today support a testamentary direction for the accu-

mulation of the income of the decedent's estate over a period of lives in being plus twenty-one years. The District Court properly held the accumulation clause to be violative of established public policy, repugnant to our institutions and conditions, inconsistent with the principles of a democracy, and invalid under the common law of our time. The Court of Appeals reversed. The decision in this case is the first decision directly on the point in this country. It would not only establish for the first time the law on the subject in the District of Columbia, but would also be a persuasive initial precedent in every State in which the common law prevails, there being 35 states with no statute on accumulations.

2. The United States Court of Appeals for the District of Columbia has not given proper effect to an applicable decision of this Court, but it has applied the narrow, legalistic principles enunciated by an English court in 1799—principles which, even at that time, were in conflict with public policy. This Court, in *Funk* v. *United States*, 290 U. S. 371, held it to be the duty of a court, where Congress has failed to act, to decide a question relating to rules of common law in accordance with present-day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past.

3. The United States Court of Appeals for the District has not given proper effect to applicable decisions of this Court, in that it held (a) that in a case of first impression as to which the legislative body has better facilities for the study of related problems (R. 154), a court must hold a will valid; (b) that a general assumption in judicial dicta, although without a decision in point, constitutes a "tenor of case law" which amounts to a precedent; and (c) that where a court is unable to prescribe the standards for a valid will, it should not hold invalid a specific will involved in a case before it. Contra, see *Funk* v. *U. S.*, *supra; Wright* v. *U. S.*, 302 U. S. 583, and other cases cited in our brief.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Court of Appeals for the District of Columbia, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the cases numbered and entitled on its docket, No. 7773, George C. Gertman, et al., vs. Charles Lalor Burdick, et al., and No. 7775, Charles Lalor Burdick, et al., vs. Anna Lalor Burdick, et al., and that the said judgment of the United States Court of Appeals for the District of Columbia may be reversed by this Court, and that your petitioners may have such other and further relief in the premises as to this Court may seem meet and just; and your petitioners will ever pray.

ANNA LALOR BURDICK, ET AL.
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CHARLES LALOR BURDICK AND THE CHEMICAL BANK & TRUST COMPANY, *Trustees, et al.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION BELOW.

The opinion of the District Court of the United States for the District of Columbia is reported in 33 Federal Supplement 921 (R. 80). The opinion of the United States Court of Appeals for the District of Columbia is reported in 123 Fed. (2) 924 (R. 136).

II.

JURISDICTION.

This Court has jurisdiction to issue the writ applied for under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936.

III.

QUESTION PRESENTED.

The question presented is whether the clause in the will of Willard A. Lalor directing that the surplus income of his estate, beginning at $54,000 per year and increasing to a possible $350,000 per year, be accumulated for a period ending 21 years after the death of the survivor of his two young nieces, is valid. Its validity is challenged by the petitioners on the ground of public policy, reflected in the common law.

IV.

STATEMENT OF THE CASE.

Willard A. Lalor, a resident of the District of Columbia, died October 9, 1934. His estate amounted to about $2,000,000 after estate taxes and expenses. By his will, after making certain educational bequests, he set up a trust, to run until 21 years after the death of his nieces Ruth and Esther Lalor, with small graduated annuities meantime to his brother, sister, nieces and nephews. He provided that the surplus income, over and above the annual payments to the beneficiaries, should accumulate until the termination of the trust, and thereupon the principal and the accumulated income should be divided among the lawful issue of the five nieces and nephews (R. 15).

As of March 26, 1940, the accumulated surplus income in the hands of the trustees was $305,237.93 (R. 102). The annual income of the trust for 1939 was $85,012.94 and the amount paid to annuitants was $31,500 (R. 102); the balance was accumulated as surplus. If Ruth Lalor, the younger of the two nieces, survives Esther Lalor, and lives her life expectancy of 34 years to the age of 65 years, the principal of the trust would amount to about $10,800,000 (R. 72, 103). If she lives to be 75 years old, the annual income of the trust in the year of its termination, at present rates of earning, would be $378,000, the annuities would total $24,000, and the accumulation of surplus income would

be about $350,000 that one year (R. 73). The corpus of the trust would then amount to $14,300,000 (R. 72-73).

The trustees of the trust brought a suit for construction of the will, asking, among other things, whether the clause requiring the accumulation of income is to be construed as valid (R. 4). All adult beneficiaries appeared as defendants, a Guardian ad litem was appointed for all minor beneficiaries and remaindermen, born and unborn, and all the defendants and the Guardian joined in the prayers for construction of the will.

The District Court of the United States for the District of Columbia held the accumulation clause invalid (R. 80, 107; 33 Fed. Supp. 921). The trustees and the Guardian appealed. The Court of Appeals reversed (R. 154; 123 Fed. (2d) 924).

V.

SPECIFICATION OF ERRORS.

Petitioners say that the United States Court of Appeals for the District of Columbia erred:

1. The Court erred in failing to hold that a will directing the accumulation of the income of the estate for lives-in-being-plus-21-years after testator's death, is contrary to public policy and invalid under the common law.

2. The Court erred in failing to examine the question of public policy in the light of present conditions and our American institutions, this being a case of first impression in this country.

3. The Court erred in holding that a tenor of judicial dictum and a general assumption by text writers, all based on an English case in 1799, not a part of our common law and instantly repudiated by Parliament, creates a precedent or a rule of common law.

4. The Court erred in holding that in the first case in which a point of law arises as an essential element of the decision, the court must rely upon a general assumption in

judicial dicta and text writers, leaving a definite declaration of the rule to the legislature because the legislature has better facilities for the study of related problems and is closer to the people.

5. The Court erred in holding that it could not hold the clause in the will in the case at bar invalid because it could not fix the standards for a valid clause.

6. The Court erred in holding the testamentary direction involved in this case valid upon any ground.

7. The Court erred in reversing the decision of the District Court of the United States for the District of Columbia.

VI.

ARGUMENT.

A.

The Controlling Law.

There is no statute on accumulations in the District of Columbia.

There is no controlling judicial decision upon the question at bar. The District Court, the Court of Appeals and all parties to the proceeding agree that this is a case of first impression.

The common law governs, and that common law is the common law of the United States, in the twentieth century, appropriate to our institutions. It embodies sound public policy as an integral part thereof.

B.

The Thellusson Case.

The Thellusson case (*Woodford* v. *Thellusson*, 4 Ves. 227; 31 Reprint 117; 11 Ves. 112; 32 Reprint 1030), is the only recorded decision directly on the point here involved. It is the source from which all authorities, judicial and

otherwise, draw their comments on the rule governing accumulations.

The Thellusson case arose in 1798 upon a will executed in 1796 by Peter Thellusson, a resident of Great Britain. The will provided that after paying the family certain relatively small amounts, the remaining income should be accumulated during the lives of testator's sons, grandsons and great-grandsons as might be living at his death, through the natural life of the last survivor. Upon the death of this survivor the fortune was to be divided into three lots, one to the eldest male lineal descendant of each of testator's three sons; and upon failure of any of these three branches, then to the other two, or the other one. Cross bills were brought in the Court of Chancery to declare the trusts void and to construe the will.

A brief but authoritative resume of the proceeding will be found in Hargrave's *Treatise on the Thellusson Act*, a copy of which can be found in the Law Library of Congress.

The arguments and opinions cover 72 pages of fine print in the English Reprints and an accurate summary is impossible within the limits of this brief. Suffice it to say that the judges called to the case by the Lord Chancellor were of opinion that in several cases the court had held that accumulated profits could, and in the absence of testamentary direction would, go to the person who by the executory devise takes the thing from which the accumulation arose, and that while the period for which such accumulations might continue had apparently never "struck the Court", yet those decisions plainly adopted for accumulations the rules pertaining to executory devises themselves; and that the intention of the testator must govern, regardless of the merit or demerit of the intention, and "however they may condemn the object." The Lord Chancellor, for the reasons outlined by the judges, held the will valid.

An extraordinary step was then taken. A bill was introduced in the House of Lords by the Lord Chancellor himself, Lord Loughborough, (see Hargrave's Treatise, p. 39) prohibiting accumulations of income for periods longer than

the minorities of minor beneficiaries or a term of 21 years. The bill was rushed to enactment and on July 28, 1800, became the law of Great Britain (39 and 40 Geo. III, ch. 98). *Thereafter*, on February 19, 1801 (Hargrave, p. 9), ten months after the opinions had been rendered, the Lord Chancellor rendered his final decree in the Thellusson case. The case was appealed to the House of Lords, was argued there for several days, and on or about June 30, 1805, was affirmed (11 Ves. 112; 32 Reprint 1030). Thus, *before the decree was entered in this unusual case*, the public policy of Great Britain was declared by legislative act at the instigation of the Lord Chancellor who heard the case.

The attitude and action of the Lord Chancellor relative to the public policy involved is pertinent and important in any consideration of the question as it arises for the first time in this country a hundred and forty years later.

The Court of Appeals in the present case correctly held that the Thellusson case is no part of the common law of this country (R. 145). The Court rested its conclusion upon the very simple ground that the Thellusson decision was not rendered until after the Revolution. We concur in the result on this point but upon many and more basic reasons. The opinion in the Thellusson case did not purport to reflect a sound public policy on the question involved; the Lord Chancellor in his role as a Member of the House of Lords applied public policy in a legislative act while the court delayed the final order in the case. The opinion is fallacious in many phases of its reasoning, as we suggested in detail in our brief below. The decision is repugnant to our institutions and therefore not part of our common law. The advisable brevity of the present argument does not permit the development of these points. In any event, we agree with the conclusion of the Court below that the Thellusson case is no part of our common law.

Having reached this stage of the case in agreement, we maintain that thereafter the Court of Appeals was in error.

C.

Contention of Petitioners.

Our position in this case is quite simple. We contend that to permit a man to decree that upon his death the income of his estate shall be withheld from the next living generation, and be accumlated for a period as long as lives-in-being-plus-21-years, is contrary to public policy. It is wrong individually and wrong socially. It is established to be wrong by reason, by history, by ethics, by economics, by every other known standard of judging a wrong. The public policy is fundamental and of vast importance. Its violation is a violation of the common law.

The Lalor Will is an exact counterpart of the Thellusson Will, of which Chancellor Kent said (Comm., Vol. 4 (14th Ed.) 285):

> "This is the most extraordinary instance upon record of calculating and unfeeling pride and vanity in a testator, disregarding the ease and comfort of his immediate descendants, for the miserable satisfaction of enjoying in anticipation the wealth and aggrandizement of a distant posterity. *Such an iron-hearted scheme of settlement, by withdrawing property for so long a period from all the uses and purposes of social life, was intolerable.* It gave occasion to the statute of 39 and 40 Geo. III, c. 98 * * *", etc., describing the Thellusson Act. (Italics ours.)

Evidence of Public Policy.

How has the public policy involved been evidenced? The Court of Appeals referred to the extent of the research evidenced by all briefs before it. Based upon the results of that effort, two generalities can be stated. First, every legislative body which has ever made any pronouncement on the subject has forbidden accumulations for any such period as lives-in-being-plus-21-years. Second, every recognized authority which the diligence of court or counsel has been able to find, and which has commented on the public policy

involved, has declared such an accumulation to be bad in so far as such policy is concerned. No authority, judicial or legislative, has ever affirmatively declared an accumulation of this character to be valid as a matter of public policy.

We have already mentioned the action of the British Parliament in 1800. The Congress of the United States has spoken only once on the subject. In enacting a code for the Canal Zone it limited accumulations to the minorities of beneficiaries or to twenty-five years. Only thirteen state legislatures have acted in respect to accumulations. All of them have prescribed periods shorter than lives-in-being-plus-21-years.

Time and again courts have declared that statutes limiting accumulations to short periods embody the public policy. See, for example, *Porter* v. *Union Trust Co.*, 182 Ind. 637, 645; 108 N. E. 117; *In re McLaughlin's Estate*, 299 N. Y. S. 559; *Bankers Trust Co.* v. *Moy*, 265 N. Y. S. 77; *State Bank & Trust Co.* v. *Foss*, 257 Ill. App. 435; affirmed 175 N. E. 12; *Matter of Rogers*, 48 N. Y. S. 175, 177, affirmed 161 N. Y. 108; *Goldtree* v. *Thompson*, (1889) 179 Cal. 613, 22 P. 50.

Bogert on Trusts says (Vol. 1, p. 645, par. 215):

> "The litigation over Thellusson's will attracted much attention. The piling up of a fortune of the immense size which it entailed so shocked the bench and bar that a statute was passed to impose further restrictions upon settlors. It was thought to be against public policy to deprive all persons of the use and enjoyment of the income of property for such a long period and to permit the concentration of so much wealth in the hands of one person or one group. The resulting statute is called the Thellusson Act."

Foulke on *Rules Against Perpetuities* says, "This (posthumous accumulation) is a surviving relic of aristocratic and feudal institutions and is contrary to the public policy of a democracy". Holdsworth's *History of the English Law*, Vol. VII, refers to "the posthumous avarice of Peter Thellusson which showed that considerations of public policy, as well as considerations of justice to near relatives, had

made it necessary to restrain trusts for accumulation within a narrower time limit than that allowed by the rule against perpetuities". Scott on *Law of Trusts* (vol. 1, sec. 62.11) says:

> "When a Mr. Thellusson created such a trust and it was upheld, it was perceived that there was something anti-social in placing property in a position where no one would receive the benefits from it for so long a period, and Parliament felt impelled to intervene."

The Court of Appeals refers to an article by Professor Simes of the University of Chicago (R. 154). In that article the learned author said:

> "Is it more subversive of the public welfare to tie up income as well as principal than merely to tie up principal? Should the rule of law which prohibits accumulations be more drastic than that which prohibits perpetuities? The English Parliament and the legislatures of thirteen American states have answered in the affirmative. With little more to guide them than the shocking will of Peter Thellusson and the astounding possibilities of compound interest, these legislators turned out a body of restrictive rules which has endured for decades."

Basis of Public Policy.

Upon what does the public policy rest? The matter is so simple as scarcely to require statement. In the first place, an accumulation of income for lives-in-being-plus-21-years works an aggravated disherison for almost two generations. To this it may be replied that restraint of alienation for the same period likewise works disherison. But the difference is that in mere restraint of alienation of principal the beneficiaries enjoy the fruit of the trust throughout the entire term to the same extent, and perhaps more certainly, than if they had unfettered control of the corpus. Such disherison is more technical than actual. There are degrees and kinds of disherison and the legality of a lesser degree of the

admitted evil does not necessarily compel validity to the extreme limit of the possibilities.

In the second place, to permit a decedent to decree by will the accumulation of income for so long a time would enable the dead hand to vest tremendous economic power in an unknown personality of a distant generation. If Lalor's will be valid, Lalor will have placed a vast fortune and its accompanying power in the hands of an infant of unknown characteristics or, if any of the now-infants live so long, in the lap of an aged person who will have been denied all benefits of this fortune throughout the years of his greater usefulness. As the learned Justice of the District Court pointed out, this is feudal in its operation and outcome. It is repugnant to our institutions. Ethically it is a wrong. From another viewpoint it is a wrong to permit a dead hand to stagnate the flow of current income, the interchange of the products of labor and thought, upon the ease and rapidity of which the public good depends. If the rule announced by the Court in this case be generally applied, the income of any generation could be held to any specified channel by the dead direction of the past, just as Lalor would hold this income for a generation plus twenty-one years to a small list of specified investments. This is an economic wrong, violative of sound public policy.

Pressed with these latter arguments the Court of Appeals advanced several replies. It said that perhaps the anticipated growth in the trust fund would not occur, and pointed to the Thellusson estate (R. 152). The Court overlooked the fact that by a special act the British Parliament permitted the trustees of the Thellusson estate to rent the lands, in which the corpus was invested, to the beneficiaries and thus in part frustrated the intention of the testator. The Court says that the anticipated growth by accumulation rests upon "imponderable factors" (Note 49, R. 152). Even if that be so, is the decision of a question of so great general importance to rest upon the assumption that the intended result will not ensue? The Court, we respectfully

submit, cannot rest its conclusion upon an assumption that what it approves will not occur.

Next the Court says that it is "highly dubious whether size should be relevant". In so stating the Court, we respectfully submit, ignores the matter before it. To be sure, the Lalor estate is before it, but the decision is to declare the law for this jurisdiction and by persuasion for all other jurisdictions where the common law prevails. The question here is not merely whether Willard Lalor, dead, can accumulate a fortune of $10,000,000 or more. The question is whether anybody, and therefore everybody, may posthumously accumulate fortunes to the denial of the next succeeding generations and the relative aggrandizement of some distant personality. The Court is compelled in this case to declare the public policy on this matter, and it cannot cushion the impact of its finding by reasoning that if the amount in a single case were small the damage would be slight and the same rule of law must apply where the amount is large. The result of the decision must be viewed in its effect assuming the rule to be applied by every testator impelled by a selfish ambition.

In the next place, the Court said that although posthumous accumulation is bad, "living greediness is bad too", and "the whole system of inheriting is a carry over from the past". The unspoken premise in that reasoning is an identity of accumulation during life and accumulation after death. The fallacy is apparent. The right of devise, and more particularly of executory devise, was created by law, statutory or common. The law permits a fortune once accumulated to remain intact by testamentary declaration for a period of time. Social considerations, based principally upon the importance of maintaining the family unit, are held to justify such provision. There is no conceivable similarity between that principle and a rule which would permit the *accumulation* of a fortune by a person long since dead. The living have inherent natural rights, which under

our democratic concepts, include the right to accumulate and keep property. The dead have no such rights. The freedom of the living is a basic principle. To confuse it with permissive privilege of the dead is grievous error.

Other respects in which this accumulation violates public policy can be named. The necessity for brevity in the present argument prevents their elaboration. It is contrary to sound public policy to allow a dead man or a departed generation to compel income of the present and future to be invested and reinvested in a specified form of debt, as Lalor by his will sought to do. It is contrary to sound public policy to lock the disposition of the income of generations in any inflexible mold. It is contrary to sound public policy to allow a past generation to stultify the social development and to inhibit the economic growth of succeeding generations. All these points are obvious upon their statement.

The Court of Appeals has not met the issue nor answered it. The matter is of vast general importance and under the rules of this Court, certiorari lies.

D.

Opinion of the Court of Appeals.

The Court of Appeals was guided to its ultimate conclusion by three propositions, (1) that it has been "generally assumed" (R. 145), as shown by the "tenor of case law" and text books (R. 146), "albeit not in fully discussed direct holdings", that accumulation of income is permissible for the full period of the rule against perpetuities (R. 148-149), (2) that since "a court does not have as good facilities to study" related problems and periods of future interests as the legislative body, it "therefore hold(s) the accumulation provision of this testamentry disposition valid" (R. 154), and (3) that because the Court finds difficulty in fixing standards (as to size, subject, length, exceptions, etc.) for *proper* accumulations, and the next testator would thus have no guide in respect of what is good (which "would not

be a very happy policy"), the Court should not declare this clause invalid (R. 150-151).

We dispute the validity of all three of the foregoing propositions upon which the decision of the Court of Appeals rests.

The "Tenor" of the Law.

The Court of Appeals relied principally upon the "tenor of the case law" (R. 146, 147). We examine thoughtfully this view of the Court. We have read each authority and case cited. Many of them were on our brief below. The Court (a) recites a "general assumption", citing cases, (b) admits that it has found no case which directly held the rule it recites but ascribes this lack to "the accepted-in-practice common law which deterred litigation", (c) discusses *Fitchie* v. *Brown,* 211 U. S. 321, and (d) discusses *Moeller* v. *Kautz,* 112 Conn. 481, 152 Atl. 886. We consider briefly each of these points.

The cases cited by the Court as establishing a "general assumption" are in three footnotes to the opinion, Nos. 22, 28 and 29. Space does not permit analysis of each within the limits of this brief. There are twenty-one in all. Many in the list did not involve accumulations at all, but were concerned with the validity of trust estates under the rule against perpetuities. Many of them held invalid the accumulation clause involved. *Not one of them involved an accumulation for so long a period as lives-in-being-plus-21-years.* The point involved in the case now at bar was neither a part of nor necessary to the decision in any of those cases.

It is true that some of the courts recited, in their opinions, a general rule that accumulations are permitted for the full period of the rule against perpetuities. There may be a tenor of dictum. There is no tenor of decision. Does a tenor of dictum constitute a "tenor of the case law"? The rule is well stated in *Wright* v. *U. S.,* 302 U. S. 583, where this Court said:

> "The oft-repeated admonition of Chief Justice Marshal 'that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used' and that if they go 'beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision' has special force in this instance."

Many other cases could be cited to this rule.

Moreover, every general expression of the courts referred to by the Court of Appeals, as an examination of the opinions will show, is premised upon the Thellusson case; and that case, as the Court of Appeals held, is not a part of our common law.

The Court of Appeals cites text writers as authorities for its general assumption (R. 145, note 20). Space here does not permit comment on each. Gray, for example, makes no statement that an accumulation for the full period of the rule against perpetuities is valid; he merely says that an accumulation for a longer period is invalid, an example of careful scholarship not to be found in all the other commentators on the matter (Gray, Perpetuities, Sec. 671). Bogert states the situation with care (Trusts and Trustees, Sec. 215, Vol. 1) and cites fourteen cases. In seven the accumulation clause was held invalid, in two no accumulation was involved, in the remaining five the periods were the lives of testator's children, the minority of testator's grandson, the grantor's own life, 20 years, and 9 years. In none was an accumulation for lives-in-being-plus-21-years involved. So with the other text writers.

The "tenor" of the statutes is an important consideration. The British Parliament, the Congress and every State Legislature which has enacted a statute on the subject, has outlawed accumulations such as this. The tendency and spirit "(not the *letter*, be it observed)" of legislation is an important control over the decisions of the courts in dealing with common law rules. *Funk* v. *U. S.*, 290 U. S. 371, 379. The Court of Appeals gave this tenor of legislation no weight.

So the position of the Court of Appeals amounts to this: That a repeated general dictum based upon an English case not part of our law and repudiated by an aroused Parliament even before the decree was entered, establishes the common law of our country and our time, although there has never been a *decision* on the point and although the uninterrupted tenor of legislative enactment has been to the contrary. We insist that the position is untenable. We insist that when for the first time such a point is a necessary element of the decision in a case before a court, the court must examine the question in the light of sound reason and the condition of our times, declare the public policy and apply the resultant rule of the common law.

It is the established law that even if there be an ancient rule, and even if Congress has failed to act, it is the duty of the court "to decide it in accordance with present day standards of wisdom and justice", even though this necessitates the overthrow of an established rule of the common law. This Court stated the controlling doctrine in *Funk* v. *U. S., supra,* and the language of its opinion on pages 379 and 383 of the Reports expresses our argument on the point. Mr. Justice Holmes once wrote (The Path of the Law, Collected Papers, p. 187), "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."

The Court of Appeals deduces from the lack of a precedent in point that the rule has been so well-established that no one has ever attempted to question it. The fact is that many less protracted periods of accumulation have been attacked in court and many held invalid, as the cas s show. The only tenable deductions are that so over-whelming an ambition for posthumous aggrandizement is a rare occurrence, or that the public policy is so obvious that few will attempt to flaunt it.

The Court of Appeals refers to *Fitchie* v. *Brown, supra,* as reflecting the "tenor of our case law." In the first place, no question as to the period of the accumulation was raised in the case or mentioned by the Court. As this Court said

in *KVOS* v. *Assoc. Press*, 299 U. S. 269, "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." Moreover, even if the Court had considered the question, it would have been bound by an Hawaiian statute which provided:

> "The common law of England, as ascertained by English and American decisions, is declared to be the common law of Hawaii" (Sec. 1, Chap. 1 of the General Laws of Hawaii).

There being no American decision on the point, and the Thellusson case being the only English case, the Court would have been bound by the Thellusson decision. To apply *Fitchie* v. *Brown* as a precedent to the case now at bar, the Court would have to hold that the English law as found in the *Thellusson* case is binding at this time in this jurisdiction. There is no such rule.

In *Moeller* v. *Kautz*, 112 Conn. 481, 152 Atl. 886, cited by the Court of Appeals, the court expressly held that it had power to declare void accumulation clauses "aside from any violation of the settled rules of law, because under the peculiar facts of the case they contravene a sound public policy."

Prescription of Valid Accumulations.

The Court of Appeals next held that because it could not prescribe all the elements for valid accumulations it could not declare any accumulation invalid. With the greatest respect we submit that no proposition could be further from the established law. Every day the courts declare invalid given transactions, contracts, wills, practices, arguments, remedies, because of some undefined standard. Fraud, laches, reasonableness, recklessness, probability, even justice itself are examples. We earnestly submit that to permit this doctrine to remain in the law of this jurisdiction would create an endless confusion at total variance with the very essence of equity jurisprudence. It is an interesting

fact that Lord Nottingham was confronted with precisely the same argument in *The Duke of Norfolk's* case (3 Chan. Cases 1; 2 Ch. Rep. 229; 22 Reprint 931) when he extended the rule against perpetuities to the present generally accepted period, and in reply he said:

> "It has been urged at the Bar, where will you stop, if you do not stop at Child and Bayley's case? I answered, I will stop every where, when any inconvenience appears; no where before. It is not yet resolved, what are the utmost bounds of limiting a contingent fee upon a fee; and it is not necessary to declare, what are the utmost bounds to a springing trust of a term; whenever the bounds of reason or convenience are exceeded, the law will quickly be known." (11 Ves. 116.)

Necessity for Legislation.

The Court of Appeals held that because the legislature has better facilities than the court for the study of related problems of future interests, and because the court does not represent the people as directly as does the legislative body (R. 154), the court must hold this will valid. This is a declaration of impotency which has been denied repeatedly by judges and scholars of American jurisprudence. The common law, creation and great pride of the judiciary, is a vital, living, growing, changing body of rules. The pertinent citations are familiar, Cardozo on "The Growth of the Law", among many. None of the rules of the common law were legislative in their creation. If this declaration of the Court of Appeals remains as the law of this jurisdiction, our common law will have been stripped of that flexibility and capacity for growth and adaptation which is its peculiar boast and excellence. *Hurtado* v. *California*, 110 U. S. 516, 530; Mr. Justice Stone dissenting in *Dimick* v. *Schiedt*, 293 U. S. 474, 496. The vital, basic doctrine of the common law is that "whenever an old rule is found unsuited to present conditions or unsound, it should be set aside and a rule declared which is in harmony with those conditions and meets the demands of justice." *Katz* v. *Walkinshaw*, 141 Calif.,

116; 70 P. 663; 74 P. 766; *Flaudermeyer* v. *Cooper*, 85 Ohio St. 327; 98 N. E. 102. In *Funk* v. *U. S.*, *supra*, this Court referred to the *duty* of courts to act, in the absence of Congressional action.

We do not mean, of course, that certainty of law is not to be sought by all possible means. But here we have no decided case in point as a precedent. We have only a tenor of dictum. We have a clear public policy and an unbroken tenor of legislative declaration. We insist that it was error of tremendous general importance for the Court of Appeals to declare that under such circumstances the Court was impotent to declare the true rule of public policy and of the common law.

E.

Questions of General Importance.

Lord Campbell in his "Lives of the Lord Chancellors of England" refers to the Thellusson case and says that it "raised a question of much public importance" (Vol. VII, p. 436). The same question is in this case, the first on the point in this country. The same remark applies.

We submit that in this case the Court of Appeals for the District of Columbia has decided these questions of general importance:

(a) It decided that under the common law of this time, a decedent may by will direct the accumulation of the income of his estate for the full period of the rule against perpetuities. This is the first American decision on this point.

(b) It decided that a tenor of dictum is a tenor of case law and creates a precedent on the point involved. This is contrary to the general rule and to decisions of this Court.

(c) It decided that upon a point as to which the legislature has better facilities for the study of related problems, the court should not hold invalid a will involved in a case before it. This is contrary to many decisions of many courts.

(d) It decided that repeated dictum premised entirely upon an ancient English case, not part of our common law, creates a precedent, and in that situation the Court failed to examine the question in the light of sound reason and American conditions in our time.

We submit that under the Rules of this Court, a writ of certorari should issue. The petition should be granted.

Respectfully,

E. Barrett Prettyman,
F. G. Awalt,
Raymond Sparks,
Attorneys for Petitioners.

Hewes, Prettyman, Awalt and Smiddy,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 977.

ANNA LALOR BURDICK, ET AL., *Petitioners*,

v.

CHARLES LALOR BURDICK AND CHEMICAL BANK & TRUST COMPANY, TRUSTEES, ET AL.

BRIEF OF CHARLES LALOR BURDICK AND CHEMICAL BANK & TRUST COMPANY, TRUSTEES, IN OPPOSITION TO PETITION FOR CERTIORARI.

Opinion Below

The opinion of the District Court of the United States for the District of Columbia is reported in 33 F. Supp. 921 (R. 80).

The opinion of the United States Court of Appeals for the District of Columbia is reported in 123 F. (2d) 924 (R. 136).

Jurisdiction

The judgment of the United States Court of Appeals for the District of Columbia was entered November 26, 1941 (R. 136). The petition for certiorari was filed February 25, 1942. Jurisdiction is conferred by Section 240(a) of the Judicial Code.

Statement

Willard A. Lalor died October 9, 1934, domiciled in the District of Columbia and leaving a will which is the subject of this suit. The testator was unmarried. He left his personal effects, jewelry, furniture, works of art, and articles of a similar nature to his only living brother and sister, to be distributed by them as they might deem best. He then left $400,000 in trust for the establishment of two educational foundations. The residue was left in trust for the benefit of his nearest relatives and five old friends. $1,500 was to be paid annually to each of the friends of the testator. $6,000 was to be paid annually to his brother, and a like amount of $6,000 annually to his sister. An annuity was also left to each nephew and niece, to increase as they grew older up to a maximum of $6,000 annually. Children of nephews and nieces were to take the place of their parents in receiving the annuities. Income beyond that necessary to pay the annuities was to be reinvested by the trustees for the benefit of the trust fund. The trust was to last until twenty-one years after the death of the survivor of two of the nieces, and the principal with accumulated income was then to be distributed among the nephews and nieces or their descendants per stirpes (R. 12-18).

After payment of the annuities, $305,237.93 excess income had been accumulated during the period from the death of the testator on October 9, 1934, to January 1, 1940 (R. 102), and the District Court found that using the life expectancy of the annuitants, the average rate of income "as of the

present time" (July 3, 1940), and the average rate of annuity payments, the principal of the trust at the time of distribution should amount to at least $10,800,000* (R. 103).

The petitioners Anna Lalor Burdick, et al., are the brother, sister, nephews and nieces of the testator. They contend that the provision for accumulation of income is contrary to public policy, invalid and void. The United States Court of Appeals, however, held that the provision was valid.

Argument

The case presents no question of general importance. The decision of the United States Court of Appeals for the District of Columbia is that a provision in the will of Willard A. Lalor for the accumulation and reinvestment of income from personal property during lives in being and twenty-one years thereafter is valid *in the District of Columbia,* but this decision need not be followed in any of the forty-eight states. A decision on the point by this Court would have no wider application. The law of the District of Columbia would be determined, but each state would still have its own law on the point. There is no Federal law of wills.

Nor is the case one where the United States Court of Appeals has failed to give effect to applicable decisions of this Court. On the contrary the decision is directly in accord with the view of this Court as expressed in *Fitchie* v. *Brown,* 211 U. S. 321, 29 Sup. Ct. 106, 53 L. ed. 202 (1908). There the testator, a resident of Hawaii, had created a trust "for as long a period as is legally possible, the termination or ending of said trust to take place when the law requires

*There is, of course, no assurance that the average rate of income will be maintained, and the present trend of interest rates would indicate the contrary. Perhaps the testator was very wise in creating a cushion of excess income to make more certain that the annuities would always be paid.

it under the statute." The trust estate consisted of personalty and realty. Legacies to a number of persons did not exhaust the income, so that an annual accumulation was involved. The Court held that the trust was valid for a period of twenty-one years after the death of the surviving annuitant saying:

> "Our first inquiry is, Was this trust valid as a whole? It is conceded by all that the common law is applicable, and that there is no statute in Hawaii governing the subject, except the statute making the common law applicable there, and that the utmost extent of a trust at common law is limited by lives in being at its creation and for twenty-one years thereafter; * * *". (P. 329.)

The United States Court of Appeals discussed the famous English case of *Woodford* v. *Thellusson*, 4 Ves. 227, 31 Eng. Rep. 117; 11 Ves. 112, 32 Eng. Rep. 1030, which sustained the validity of such a provision for accumulation, and the decision in *Fitchie* v. *Brown*, *supra*. It cited a large number of texts and decisions which supported the proposition that accumulations of income are permitted at common law for twenty-one years after lives in being. The Court then stated:

> "In view of the common understanding, and the judicial acceptance including this Court (albeit not in fully discussed direct holdings) of a rule permitting accumulations for as long as the period of the rule against perpetuities, we have no hesitation in saying that has been the common law of this country and of this jurisdiction" (R. 148, 149).

But the United States Court of Appeals for the District of Columbia did not rest its decision wholly on the common law. The Court considered the contention of the petitioners that the principle involved should be reexamined. The Court noted that, although the problem had existed for a century and a half, only thirteen states had placed statutory limits on accumulation. It pointed out that these statutes

had not been uniform, that there was a serious question as to whether the statutory changes represented any improvement, and that in the absence of a local statute there was no guide whereby the Court could determine what rule to establish if the common law rule was to be abandoned. What limit should be set to the amount of the accumulation? Should it apply to realty, or personalty, or both? For what period should accumulations be held good or bad? Should an illegal accumulation be held bad in whole or only as to the excess? What exception might be adopted? On these points the Court found that the statutes varied widely, and the Court concluded that if there was to be any change in the period for accumulation permitted at common law such change should be accomplished by a statute, definite in its terms and prospective in its operation. The Court concluded;

> "* * * It is, moreover, highly dubious whether size should be relevant in the courts on the issue of good or bad accumulations. In keeping with the general attitude of the law which for the most part avoids such distinctions, none of the states have made size relevant in their legislative action. * * * This trust, moreover, directs that the income is to be reinvested. This trust estate is no Fort Knox. We are not prepared to say how much better or worse is the use of this money by a trustee to buy a security than by an heir or beneficiary to purchase a topcoat."
>
> * * *
>
> "Under the accepted, established common law to date, this accumulation is good. Even though the common law is organic, the rule for this case should not be changed. Only 13 states have seen fit to change that rule by statute. The changes have not been uniform. There is a serious question as to whether the changes represent any improvement.[51] Changing the rule by holding the accumulation in this case bad would not make for an orderly improvement in our law. Any change made in the rule for accumulations should be correlated to other problems and periods in future in-

[51] Simes, Statutory Restrictions on the Accumulation of Income (1940) 7 U. of Chi. L. Rev. 409.

terests.[52] A court does not have as good facilities to study these problems, nor does it represent as directly the people, as the legislative body. We therefore hold the accumulation provision of this testamentary disposition valid."

[52] 54 Harv. L. Rev. 839 (1941). (R. 153, 154.)

Conclusion

It is therefore prayed that the petition for certiorari be denied. The case presents no question of Federal law. The effect of the decision is local to the District of Columbia. The decision is in accordance with the holding of this Court in *Fitchie* v. *Brown, supra,* and with established common law. It is correct in principle.

Respectfully submitted,

DALLAS S. TOWNSEND,
GARDNER DUGALD HOWIE,
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Attorneys for Respondents.

(16)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 977

ANNA LALOR BURDICK, THOMAS JEFFERSON LALOR, CHARLES LALOR BURDICK, THOMAS MORTON LALOR, MARGARET LALOR CARY, RUTH LALOR OLSON, AND ESTHER LALOR GUTH,
Petitioners,

vs.

CHARLES LALOR BURDICK AND CHEMICAL BANK & TRUST COMPANY, TRUSTEES, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF OF RESPONDENT GEORGE C. GERTMAN, GUARDIAN AD LITEM, IN OPPOSITION TO GRANTING OF PETITION.

GEORGE C. GERTMAN,
Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 977

ANNA LALOR BURDICK, THOMAS JEFFERSON LALOR, CHARLES LALOR BURDICK, THOMAS MORTON LALOR, MARGARET LALOR CARY, RUTH LALOR OLSON, AND ESTHER LALOR GUTH,

Petitioners,

vs.

CHARLES LALOR BURDICK AND CHEMICAL BANK & TRUST COMPANY, TRUSTEES, ET AL.

OPPOSITION OF GEORGE C. GERTMAN, GUARDIAN AD LITEM, TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

The Guardian *ad litem* appears pursuant to the authority vested in him by order entered December 6, 1938 (R. 29) and subsequent orders entered April 22 and April 29, 1940 (R. 61, 62) whereby he was appointed to represent infant defendants named in the supplemental complaint.

1. The case stated by the petitioners presents no question of general importance to the public. The Court of Appeals followed the testamentary law as established by the Courts of this Country and England for a century and a half and

it did not ignore the only applicable decision of this Honorable Court which is *Fitchie* v. *Brown*, 211 U. S. 321, 53 L. Ed. 202, 29 S. Ct. 106. The case of *Funk* v. *United States*, 290 U. S. 371, upon which petitioners rely, deals with the subject of criminal law procedure and the common law applicable thereto and not with the subject of Wills or trusts.

Willard A. Lalor who was the brother of petitioners Anna Lalor Burdick and Thomas Jefferson Lalor and the uncle of petitioners Charles Lalor Burdick, Thomas Morton Lalor, Margaret Lalor Cary, Ruth Lalor Olson and Esther Lalor Guth, died on October 9, 1934, possessed of an estate worth approximately $2,500,000.

By his Will (R. 9-18), probated in the District of Columbia, he gave outright $400,000 for educational purposes, and what was left, $2,001,646.92 (R. 3, 34), went to his trustees in trust to be administered under Article Fifth of the Will, viz:

> "Fifth—All the rest, residue and remainder of my estate, both real and personal, of whatsoever nature and wheresoever situated, of which I shall be seized and possessed or to which I shall in any way be entitled at the time of my death, I give, devise and bequeath to my Trustee hereinafter named, In Trust Nevertheless, to invest, reinvest and keep the same invested for the period of twenty-one (21) years after the death of both my nieces, Esther Lalor and Ruth Lalor, and during such trust period to collect, recover and receive the issues, income, interest and profits thereof, and after deducting the commissions of the Trustee and the proper and necessary expenses of the administration of the trust, to make payments from the same in quarterly installments of equal amount as follows, viz:
>
> (Then follow the provisions for payment of annuities to relatives and friends.)
>
> "Upon the expiration of the period of twenty-one (21) years after the date upon which the survivor of my

said nieces, Esther Lalor and Ruth Lalor shall have died, this trust shall terminate and my Trustee shall forthwith assign, transfer and pay over the principal and accumulations of said trust fund, or the property into which the same may have been converted, or the proceeds thereof, as follows, viz:

"J—To my nephew, Charles Lalor Burdick, one-fifth (1/5) thereof, and if he be then deceased, to his lawful issue per stirpes and not per capita.

"K—To my nephew, Thomas Morton Lalor, one-fifth (1/5) thereof, and if he be then deceased, to his lawful issue per stirpes and not per capita.

"L—To my niece, Margaret Lalor Cary, one-fifth (1/5) thereof, and if she be then deceased, to her lawful issue per stirpes and not per capita.

"M—To the lawful issue per stirpes and not per capita of my niece, Ruth Lalor, one-fifth (1/5) thereof.

"N—To the lawful issue per stirpes and not per capita of my niece Esther Lalor, the remaining one-fifth (1/5) thereof.

"O—In the event that any of my nieces and nephews hereinbefore mentioned shall die leaving no lawful issue her or him surviving, then her or his one-fifth (1/5) share shall be divided equally among my surviving nieces and nephews above named and the lawful issue of any deceased niece or nephew above named, per stirpes and not per capita."

During their administration of the trust estate, the trustees have each year paid the annuities to testator's relatives and friends. This year, according to computation, the annuities payable to the testator's relatives are:

Anna Lalor Burdick, sister	$6,000
Thomas Jefferson Lalor, brother	6,000
Charles Lalor Burdick, nephew	5,000
Thomas Morton Lalor, nephew	3,000
Margaret Lalor Cary, niece	3,000
Ruth Lalor Olson, niece	2,000
Esther Lalor Guth, niece	2,000

Of course, as the nieces and nephews advance in years, their annuities will correspondingly increase until each receives $6,000, when the total annuities to relatives and friends will be $49,500 or about half of the present income of the trust estate.

The balance of the accrued income has been reinvested and added to the corpus of the trust estate as directed by the Will. It is this accumulated balance and the surplus income of the trust estate to be earned in the future that petitioners seek to obtain—contrary to the *expressed* intention of the testator.

2. After administering the trust for several months, the trustees on December 23, 1936 filed the original complaint (R. 1-9) mainly to have the Court instruct them whether the testator's direction to reinvest and accumulate the surplus income for the duration of the trust was valid; the main purpose of the supplemental complaint (R. 56-59) was to have the Court instruct them whether the whole of Article Fifth was valid.

The Guardian did not join in the prayers for construction of the Will nor agree that this is a case of first impression. Instead, in his answer to the original complaint (R. 33-39), the Guardian ad litem said:

> (a) "It is no part of the duty of a trustee to lead an attack upon the validity of a Will or any part thereof. The trustee represents the dead and while it is necessary and proper that he should fully state the points of difficulty, the same reasons which cast upon him the responsibility of procuring and defending the probate of the Will at the cost of the estate, require him to assume no position of actual hostility to what may appear to have been the intention of the testator."
>
> (b) "The first question presented to the Court by the trustees' bill of complaint is whether the provisions of the Will for the accumulation of the unused income of the estate are valid. This question is answered affirmatively by the Supreme Court of the United States

in Fitchie *v.* Brown, 211 U. S. 321. See also Moeller *v.* Kautz, 112 Conn. 481."

On the other hand, the petitioners, both in the District Court and in the Court of Appeals, took the position that Article Fifth violated Sec. 1023, 1901 D. C. Code, and for that reason it was invalid (R. 120). Sec. 1023, which is a part of the public policy of the District of Columbia (see *Colonial Trust Co.* v. *Brown,* 105 Conn. 261, 135 A. 555), is as follows:

> "Perpetuities.—Except in the case of gifts or devises to charitable uses, every future estate, whether of freehold or leasehold, whether by way of remainder or without a precedent estate, and whether vested or contingent, shall be void in its creation which shall suspend, or may by possibility suspend, the power of absolute alienation of the property, so that there shall be no person or persons in being by whom an absolute fee in the same, in possession, can be conveyed, for a longer period than during the continuance of not more than one or more lives in being and twenty-one years thereafter."

Disposing of the question raised by the supplemental complaint, the District Court adjudged that Article Fifth did not violate Sec. 1023 of the 1901 D. C. Code, and that it was therefore valid (R. 107). From this part of the decree the petitioners perfected an appeal (R. 120, 121). The Court of Appeals affirmed the District Court upon this phase of the case (R. 137-142) and the petitioners have abandoned their contention regarding it.

However, in adjudicating the question raised by the original complaint, the District Court held (R. 108) the provisions of Article Fifth directing the reinvestment and accumulation of the surplus income invalid and ordered payment of the surplus income, both accumulated and hereafter accruing, to the testator's next of kin *as intestate property.* The Guardian ad litem promptly noted and perfected an appeal (R. 108-111) which the petitioners unsuc-

cessfully attempted to have dismissed (R. 123). Thereafter the Court of Appeals reversed the District Court upon this phase of the litigation (R. 142-154) and it is this part of the decision which petitioners now seek to have reviewed.

The Will, in its entirety, therefore stands before this Honorable Court unimpeached and perfect and valid in every respect, and the trustees stand instructed accordingly.

(NOTE.—The guardian ad litem observes a mistake in the mandate (R. 155) and in due course will proceed to have it corrected to conform with the decision of the Court of Appeals so as to order the affirmance in part and reversal in part of the appealed decree.)

3. If the petitioners' contention is sound that it is wrong socially, ethically and economically to permit a man to direct that upon his death the income of his estate shall be withheld from the next living generation, and be accumulated for a period as long as lives in being and twenty-one years, then they should be public spirited enough to petition the Legislature, as was done in thirteen States, to reform the law permitting it to be done. But the Court is not the forum by which to obtain the *post mortem* reform.

In the Thellusson case it was said by the Master of the Rolls a century and a half ago that—

> "The Judges are to declare the law, not to make the law. If any inconvenience arises, the Legislature, not the Judges must apply the remedy."

It cannot be said that in the year 1908 it was wrong socially, ethically and economically for a testator to do what Lalor did because in that year this Court itself, in *Fitchie* v. *Brown*, declared that inasmuch as Galbraith, whose Will was before the Court for construction, did not himself provide for the reinvestment and accumulation of the surplus income of the trust estate, the law would do it for him. The exact language of the Court being—

> "The Will shows that the testator supposed that there would be such surplus. Should it be accumulated or paid to the heirs of testator? We think the surplus, after paying annuities, must accumulate as part of the trust estate until the time arrives for the distribution of that estate, and that such accumulation must then be distributed as a part thereof to those who would then have the right to take the estate as provided for in the Will."

When Lalor made his Will, presumably he knew the law established by *Fitchie* v. *Brown* and by the Circuit Court of Appeals in *Dahlgren* v. *Pierce,* 270 Fed. 507 (certiorari denied, 256 U. S. 682, and appeal dismissed, 692), where, after discussing *Fitchie* v. *Brown,* the Court said—

> "In trusts for accumulation, the entire income may be tied up and paid to no one, provided the final period of vesting or distribution does not violate this rule against perpetuities. This is so obvious that it is assumed as the starting point of all discussions whether particular trusts for accumulation are good."
>
> See also Page on Wills (Lifetime Ed.), Vol. 3, s. 1156; Page on Wills (2d Ed.), Vol. 2, ss. 1023, 1024, 1106.

It is nowhere alleged in the petition that Lalor, in making his Will, disobeyed the rule against perpetuities, the rule against restraint of alienation of property, any statutes or any established common law principle, nor that he ran counter to any decision of the Court, consequently it becomes the duty of the Court, as was said in *Shelton* v. *King,* 229 U. S. 90, 33 Sup. Ct. 686, 690, 57 L. Ed. 1086, to carry out the provisions of the Will; the exact language of the Court being—

> "There is no higher duty which rests upon a court than to carry out the intentions of a testator when the provision is not repugnant to settled principles of public policy and is otherwise valid."

The petitioners also contend that public policy condemns such accumulation and that the surplus income should be allowed to go, *as intestate property,* to the next of kin instead of in the channel directed by the testator, but they nowhere point out that there is anything expressed in the Organic Act, statutes, judicial decisions of the Courts, or in any established principle of the common law applicable to testamentary documents which is opposed or hostile to the enforcement of the testator's Will.

This Court and other Courts, however, have pointed out the sources of information to which Courts must look to determine the public policy of a State, namely, the Constitution, laws and judicial decisions.

In *Hartford Fire Insurance Co.* v. *Chicago M. & St. Paul Railway Co.,* 175 U. S. 91, 44 L. Ed. 84, which affirmed 70 Fed. 201, the Court had before it for decision the question of what constituted the public policy of a State regarding *acts done,* and there Mr. Justice Gray said—

> "Questions of public policy as affecting the liability for acts done, or upon contracts made and to be performed, within one of the states of the Union,—when not controlled by the Constitution, laws, or treaties of the United States, or by the principles of the commercial or mercantile law or of general jurisprudence, of national or universal application,—are governed by the law of the states as expressed in its own Constitution and statutes, or declared by its highest Court." (Citations.)

And in *Swann* v. *Swann,* 21 Fed. 299, the Circuit Court of Appeals, speaking upon the subject of public policy, said—

> "Vague surmises and flippant assertions as to what is the public policy of the state, or what would be shocking to the moral sense of its people, are not to be indulged in. The law points out the sources of information to which courts must appeal to determine the public policy of a state. The term, as it is often popularly

> used and defined, makes it an unknown and variable quantity,—much too indefinite and uncertain to be made the foundation of a judgment. The only authentic and admissible evidence of the public policy of a state on any given subject are its constitution, laws and judicial decisions. The public policy of a state, of which courts take notice, and to which they give effect, must be deduced from these sources."

Notwithstanding the law thus pronounced, and regardless of the effect upon the Wills of other deceased people where smaller or larger trust estates are involved, the petitioners seek a *post mortem* ruling by this Honorable Court that the testator's Will transgresses public policy because of the size of the accumulations, assuming continuance of the present status. But the law does not concern itself with the size of the estate or the amount involved, consequently Lalor's Will must be considered and tested as any other Will without reference to the amount it bequeaths or places in the hands of the trustees. Speaking upon this subject, the Court in *Palms* v. *Palms,* 68 Mich. 355, 36 N. W. 419, said—

> "The various questions presented to the court by the bill in this cause were ably and elaborately argued before us by counsel of eminence and ability, but it seems to me that the solution of the main question does not involve many of the questions discussed before us. And the case, in my opinion, does not depend at all upon the amount of money involved or the magnitude of the estate. If it be true that the accumulation of a great fortune by a single individual is a public misfortune and against public policy, yet, nevertheless, the power to govern that fortune and direct its course after the death of the owner, by ante mortem disposition, under our laws and the policy of our institutions is identical with the authority of the poorer man to dispose by will of the few hundred dollars that he may have saved during his lifetime. The law in this regard knows, and should know, no difference between the rich and the

poor. Indeed, it could make no distinction of this kind without special legislation, contrary to our institutions and the theory of our government.

"The Will of Francis Palms must, then, in the outset, be considered and tested as any other Will would be, without reference to the amount it bequeaths or places in the hands of trustees. Much of the argument of counsel has been directed to theories and purposes of government as regards the accumulation and holding of vast estates which, though correct in the abstract, in my opinion have no place in this discussion, and can and should have no influence whatever in determining the validity of the trust or trusts contained in this Will. If this Will would be valid if only one hundred dollars was involved it must also be valid if it disposes of ten millions. It is the wise and beneficent purpose of the courts, if possible, to uphold and sustain Wills when there is no doubt whatever of the sanity and perfect competency of the testators to make them, and that they were executed without duress or any undue influence."

If it be true in the face of cited decisions that the Court, *post mortem*, may strike down as invalid the accumulation clause of Lalor's Will because of the size of the amount involved, then the question arises: For how long might Lalor direct and control the accumulation of surplus income if the measure of time is not governed by the rule against perpetuites?

Accordingly, it is the Guardian ad litem's duty to oppose the granting of the prayer of the petition and to ask for its denial.

Respectfully,

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